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No. 98-6

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In The

Supreme Court of the United States

October Term, 1997

EL PASO NATURAL GAS COMPANY, a Delaware Corporation; CYPRUS FOOTE MINERAL COMPANY, a Pennsylvania Corporation; and CYPRUS AMEX MINERALS COMPANY, a Delaware Corporation,

Petitioners,

vs.

LAURA NEZTSOSIE; ARLINDA NEZTSOSIE; and ZONNIE MARIE DANDY RICHARDS, individually and as Representative of the Estate of HAROLD J. RICHARDS, SR.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Can an Indian tribal court be divested of adjudicatory authority to hear a case involving alleged tortious action which occurred on the tribe's territory and which harmed members of the tribe where there is no statute or regulation divesting the tribe of such authority or prohibiting it from hearing such a dispute?

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STATEMENT OF THE CASE

Petitioners are two mining companies that during the 1950's and 1960's mined for uranium in various locations on the Navajo Nation's reservation.

The underlying lawsuits in this litigation were commenced in April 1995 in the Tuba City and Kayenta District Courts of the Navajo Nation. The first of the lawsuits (*Neztsosie*) was brought by two Navajo sisters arising out the neuropathic disease from which they are suffering. The second lawsuit (*Richards*) arises out of the cancer-caused death of the plaintiff's husband. Both complaints allege that negligent mining operations by the defendants resulted in radioactive, toxic and chemical exposures that caused the respective diseases. In the *Neztsosie* case, for instance, the claim is that after defendants ceased their mining operations, they abandoned the mines without remediation, leaving the contaminated mines open as collection points for water which was then drunk by the Navajo plaintiffs' mother. The land on which the mines were situated was owned by the Navajo Nation and licensed to petitioners.

The Navajo Nation has a complete court system analogous to state court systems, including trial courts and a Supreme Court. The Navajo Nation has due process guarantees and a code of civil procedure modeled on the Federal Rules of Civil Procedure. Navajo court decisions are reported in the Navajo Law Reporter.

On January 5, 1996 and on June 26, 1996, respectively, petitioners filed lawsuits in the United States District Court for the District of Arizona seeking to enjoin the Navajo court plaintiffs from proceeding with their underlying lawsuits on the ground that the Navajo tribal courts lacked jurisdiction to

hear claims against these petitioners. Petitioners asserted that the Price-Anderson Act, 42 U.S.C. § 2011 *et seq.*, created both a purportedly exclusive federal cause of action and a federal adjudicatory forum to resolve any cases arising from a "nuclear incident". (*See* Petitioners' Appendix, hereinafter "PA", 3a, 4a.)

Relying on the tribal exhaustion doctrine, as set forth in *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985), and in order to "preserve[ ] tribal authority in its fullest measure" by permitting the Navajo courts to decide in the first instance the issue of their jurisdiction (PA 29a, 30a), the District Court refused to enjoin the tribal court lawsuits. The District Court did not rule on whether the claims at issue were encompassed by the Price-Anderson Act but it enjoined the Navajo plaintiffs from pursuing any Price-Anderson Act claims in tribal court. *Id.* The District Court's opinion is unreported.

Petitioners appealed to the Ninth Circuit which, on February 11, 1998, in a two to one decision written by Judge Pregerson, denied their appeal, affirming the District Court's ruling permitting the underlying tribal court lawsuits to proceed in Navajo Court. 136 F.3d 610. The Ninth Circuit's decision, which was based upon the tribal exhaustion doctrine, concluded that nothing in the Price-Anderson Act constituted an express prohibition on the jurisdiction of Indian courts. PA 12a-19a. Since the district court had enjoined the Navajo plaintiffs from pursuing "Price-Anderson" claims in tribal court, the Ninth Circuit *sua sponte* addressed the propriety of this injunction because of the comity issues it presented (PA 9a) and dissolved the injunction (PA 19a).[1] On April 27, 1998, the Court of

1. In so doing, the Court noted (PA 9a) that the Tenth Circuit had just rejected a similar claim in the *Kerr-McGee Corp. v. Farley* case discussed immediately below.

Appeals denied both petitioners' petition for rehearing and their suggestion for a rehearing en banc. PA 24a-26a.

REASONS FOR DENYING THE WRIT

There is no issue presented here that warrants this Court's review.

First, just eight months ago, this Court denied a writ of *certiorari* in an effectively identical case coming out of the Tenth Circuit, *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498 (10th Cir. 1997), *cert. denied*, 118 S. Ct. 880 (1998). In fact, the second petitioner in that case was the second petitioner in this case, Cyprus Foote Mineral Company, and many of the same attorneys who appeared on the prior petition are on the present petition. Except for a different sequence in the arguments, the present petition essentially repeats the contentions made in the previous petition.

The only additional development that has occurred since this Court denied the prior petition is that the Ninth Circuit in the decision below joined the Tenth Circuit in rejecting petitioners' contentions.

Thus, far from there being a conflict among the Circuits, the two Circuits that have addressed the sole determinative issue in these cases — whether the Price-Anderson Act prohibits an Indian tribal court from hearing a tort lawsuit arising out of the negligent operation of a uranium mine — have concluded that there is nothing in the Price-Anderson Act which precludes application of the tribal exhaustion doctrine established by *National Farmers Union Ins. Co., supra*, and *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). The cases petitioners cite to support their allegation of a conflict are only (a) the Tenth Circuit *Kerr-McGee* decision which presents no conflict at all

since it — like the decision below — held that the Navajo courts should first rule on Price-Anderson claims before a federal court rules passes on these issues and (b) federal court decisions that, as the Court below recognized, are "inapplicable" here because "they only address federal-state jurisdictional issues related to Price-Anderson" and "do not address Indian tribes or tribal sovereignty," PA 16a, the situation presented here.

Second, the Court of Appeals' decision below was merely one of abstention pending re-review — a decision holding that the issue of federal regulatory or adjudicatory exclusivity should first be heard by the Navajo courts prior to a possible reconsideration by the federal courts. Contrary to petitioners' intimations, the present issues will not escape federal court review. Petitioners will have the ability to challenge the Navajo courts' decision on jurisdiction should these cases proceed to judgment and appeal.

Third, petitioners' claims are misplaced. Their notion is that there is complete federal regulatory *and* judicial preemption concerning anything which involves uranium. However, there is no such preemption. Petitioners cannot point to anything in the Price-Anderson statute or in its legislative history that provides for complete federal preemption, much less a prohibition on Indian tribal courts hearing Price-Anderson Act claims (even assuming there existed complete federal regulatory preemption over nuclear torts). Lacking any legislative support for the preemption they claim, the only support they present for their position is *dicta* in several decisions, not one of which concerned the relevant issue here, that of Indian tribal court jurisdiction. To the contrary, the relevant provision of the applicable law, the Price-Anderson Act, expressly provides that cases involving injury from nuclear incidents are to be governed by substantive *state* law, 42 U.S.C. § 2014(hh), — a provision totally inconsistent with any proposition that the federal government's regulatory authority is exclusive.

Nor is there an "exclusive federal remedy for nuclear-related torts." (Pet. 10.) The Price-Anderson Act, by its very terms provides for *concurrent* federal and state court jurisdiction (with a right of removal from state to federal court). 42 U.S.C. § 2210(n)(2). While petitioners claim that this creates an exclusive federal remedy, the Ninth Circuit correctly pointed out that petitioners' support for this proposition are the "inapplicable" cases that do not "do not address Indian tribes or tribal sovereignty."[2]

Necessarily, petitioners' claim comes down to the contention that Congress must have *meant to* provide for both an exclusive federal remedy and federal court jurisdiction for cases filed in Indian courts even though it did not do so explicitly. Yet, this claim by petitioners — which is all they can really assert — turns the historic tribal sovereignty analysis on its head, as was recognized by the Ninth Circuit below, *see* PA 16a-17a, and by the Tenth Circuit in *Farley*, 115 F.3d at 1504. The inescapable fact is that well-established principles of federal law hold that Indian tribes cannot be divested of jurisdiction in the absence of an express and specific Congressional enactment. Nothing in the Price-Anderson Act divests Indian courts of jurisdiction to hear claims involving tortious injury arising out of uranium mining.

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2. Astoundingly, petitioners count the Tenth Circuit as one of the "four" circuits that supposedly accepts the view that Price-Anderson "federalized" all nuclear torts (Pet. 6, 10). What the Tenth Circuit actually held was that torts arising out of nuclear incidents are governed by Price-Anderson. The Court *did not* hold that the act "federalized" nuclear torts for adjudicatory purposes. To the contrary, it expressly rejected petitioners' contentions that Price-Anderson created an exclusive federal venue for nuclear torts that arise on Indian territory and, accordingly, ruled, like the Ninth Circuit, below, that the tribal exhaustion doctrine required nuclear tort cases to proceed first in tribal courts. 115 F.3d at 1505, 1509.

The Ninth Circuit Court of Appeals correctly rejected petitioners' argument. The petition should be denied.

I.

THIS CASE PRESENTS NO ISSUE THAT WILL ESCAPE FEDERAL COURT REVIEW.

Petitioners cannot deny that the decision below was an application of the tribal exhaustion doctrine and, accordingly, there ultimately can be federal court review of their arguments, if they wish it.

First, the decision below was only the second to address the issue of the Price-Anderson Act's applicability to Indian tribes. The only other Court of Appeals, the Tenth Circuit, that has addressed the issue has also rejected petitioners' arguments that the tribal exhaustion doctrine does not apply to nuclear torts arising on Indian lands.

Second, notwithstanding what petitioners try to suggest to the Court, they will have full opportunity to challenge the issues presented in the courts below. Three results are possible in the underlying cases: (a) petitioners could win in the tribal courts; (b) the cases could settle; or (c) the Navajo plaintiffs-respondents could succeed in the tribal courts and then petitioners could raise the jurisdictional issue anew in federal court. While the Navajo trial courts have thus far found jurisdiction, the decisions of these courts on these matters will be subject to review by the Navajo Supreme Court. And, ultimately, the issue of jurisdiction could then, again, be raised by petitioners in the federal courts.

It is thus premature for petitioners to contend that this Court should review these cases when the jurisdictional contentions

petitioners are now making have yet to be finally decided by the tribal courts. Recourse to this Court is neither necessary nor efficient.

II.

THE NINTH CIRCUIT CORRECTLY HELD THAT THE TRIBAL EXHAUSTION DOCTRINE REQUIRES THAT THIS CASE FIRST PROCEED IN TRIBAL COURT.

Petitioners do no better on the merits of their claim.

Initially, petitioners all-but ignore the specific basis upon which the court below ruled — the "tribal exhaustion doctrine" established by this Court in *National Farmers Union Ins. Co.*, *supra*, and *Iowa Mut. Ins. Co.*, *supra*. This doctrine is based on Congress' policy of encouraging tribal self-government. *See National Farmers Union*, 471 U.S. at 856-857. Under the doctrine, when a lawsuit is brought over which an Indian tribal court may have jurisdiction, a defendant may not challenge in federal court the tribal court's exercise of jurisdiction without first exhausting all tribal court remedies so long as three exceptions are not applicable: (a) the assertion of tribal jurisdiction is not motivated by a desire to harass or is conducted in bad faith; (b) the action is not "patently violative" of an "express jurisdictional prohibition"; or (c) "exhaustion would be futile because of the lack of an adequate opportunity to challenge the [tribal] court's jurisdiction." *National Farmers*, 471 U.S. at 856 & n.21; *Iowa Mutual Ins. Co.*, 480 U.S. at 19 & n.12; *see also Strate v. A-1 Contractors*, __ U.S. __, 117 S. Ct. 1404, 1411 & n.7 (1997). Ignoring the tribal exhaustion doctrine, petitioners have brought these cases in federal court to enjoin tribal court lawsuits without first exhausting tribal court remedies.

Petitioners do not contend that they meet any of the three exceptions to the tribal exhaustion doctrine. Rather, their contention is that "exhaustion should not be required where a tribal cause of action has been preempted by federal law." (Pet. 7 (initial capitals deleted).) However, the very premise upon which their argument relies is flawed since "federal law" has not preempted the right of Navajo tribal courts to hear the present cases. This is shown by the reasons set forth below.

A. There Is No Regulatory And Adjudicatory Preemption Here

This Court has consistently stated that there exists a presumption against finding a preemption of state law by federal law and that the evidence supporting preemption must be compelling. *E.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484-485 (1996); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Notwithstanding the strong showing that must be made before preemption will be found, defendants can point to nothing in the Price-Anderson Act or in its legislative history, or in any applicable federal rule or regulation that supports their contention that this Act preempted Indian tribes either on a regulatory or on an adjudicatory basis from hearing the present claims. Nor can they cannot point to a single federal regulation or rule that would be impermissibly flouted by the Navajo courts' hearing the present cases. *See Medtronic, Inc.*, 518 U.S. at 484 (even where a federal statute expressly preempts state law, it is necessary to "nonetheless identify the domain expressly pre-empted by that language) (citation omitted); *see also Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring in part and concurring in judgment) ("Our decisions establish that a high threshold must be met if a state law is to be preempted for conflicting with the purposes of a federal Act. Any conflict must be 'irreconcilable. . . . The existence of a hypothetical or

potential conflict is insufficient to warrant the pre-emption of the state statute.") (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982).

All that petitioners can cite for their preemption contentions are (1) *dicta* from *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983), concerning the federal government's exclusive right to license nuclear materials (not an issue even vaguely relevant here) and a generalized statement from *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (holding that the Price-Anderson Act did not preempt punitive damage claims), concerning federal preemption over "nuclear safety" (Pet. 8) and (2) the 1988 amendments to the Price-Anderson Act.

The worthlessness of petitioners' citations is seen in the fact that it was not until its 1988 amendments, as the Ninth Circuit noted, that the Price-Anderson Act could have affected any lawsuit other than those where the Nuclear Regulatory Commission determined that an "extraordinary nuclear occurrence" had occurred. PA 10a-11a. Thus, the *Pacific Gas* and *Silkwood* decisions cannot possibly stand for the proposition that the Price-Anderson Act provides both an exclusive federal remedy and federal jurisdiction over nuclear torts since those decisions predate the amendments.

Nor do the 1988 amendments to the Act provide any solace for petitioners. Those amendments expressly provide that in an action arising out of a "nuclear incident", the "substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent" with provisions of the Act. 42 U.S.C. § 2014(hh). Since State substantive law can provide the rule of decision in a nuclear tort case, this provision in the 1988 amendments is totally inconsistent with any claim that the

federal government's regulatory authority is *exclusive* over nuclear torts.[3]

In short, petitioners' arguments as to preemption are vague and overbroad assertions that fail even to begin to meet the rigorous requirements for showing the existence of such preemption.

B. Petitioners Ignore Established Principles Of Indian Sovereignty

Even if a legitimate issue existed as to whether Congress intended absolutely to preempt *state* regulatory authority over any tortious claims arising from the operation of a facility related to the nuclear industry, the present cases involve the alleged preemption of *Indian* rights and sovereignty, an entirely

3. As previously discussed, the decisions of other courts concerning the Price-Anderson Act's scope cited at pages 10-11 of the petition are simply "inapplicable" because "they only address federal-state jurisdictional issues relating to Price-Anderson. They do not address Indian tribes or tribal sovereignty." (PA 16a.) Petitioners also try to cite *Kerr-McGee Corp. v. Farley, supra*, as somehow supporting their contentions (Pet. 11). However, as also previously noted, that case concluded that there was nothing in the Price-Anderson Act that constituted an express jurisdictional bar to Navajo courts from hearing Price-Anderson claims. Petitioners profess to find that decision "inexplicabl[e]." (Pet. 11 n.10) What petitioners apparently fail to understand is that even if federal regulatory authority concerning nuclear safety was absolute, this does not mean there could not be concurrent federal and Indian jurisdiction to hear Price-Anderson Act claims. The Ninth Circuit made this abundantly clear when it correctly stated: "even if Price-Anderson preempts *state court* jurisdiction — still an open issue in this circuit — there is no express prohibition of *tribal court jurisdiction*." (PA 16a) As the Ninth Circuit recognized (PA 17a), and, as is discussed below, there is no implied divestiture of tribal court jurisdiction to hear lawsuits.

separate and distinct analysis from that concerning state governments. Petitioners completely ignore this difference.

As the court below recognized (PA 16a), "Indian tribes occupy a unique status under our law." *National Farmers Union*, 471 U.S. at 851. One important aspect of their unique status is that Indian jurisdiction over Indian lands is absolute unless expressly limited by Congress. This Court wrote in *Iowa Mut. Ins.*, "[t]ribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty" and that "[c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless *affirmatively limited* by a specific treaty provision or federal statute." 480 U.S. at 18.

While Congress has the power to limit or abolish a tribe's sovereignty, the "Congressional intent to infringe on tribal sovereignty must be clear." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978). Because Indian tribes

> retain[ ] all inherent attributes of sovereignty that have not been divested by the Federal Government, *the proper inference from [Congressional] silence . . . is that the sovereign power . . . remains intact.*

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 n.14 (emphasis supplied); *accord Iowa Mut. Ins.*, 480 U.S. at 18; *see also United States v. Wheeler*, 435 U.S. 313, 323 (1978) (until Congress acts to diminish tribal sovereignty, "the tribes retain their existing sovereign powers"); *Smith v. Moffett*, 947 F.2d 442, 444 (10th Cir. 1991) ("Jurisdiction presumptively lies in the tribal court . . . unless Congress has expressly limited that jurisdiction."); *United States v. White*, 508 F.2d 453, 456 (8th Cir. 1974) (statutes should not be construed so as to

abrogate rights of tribal self-government absent specific Congressional intent to the contrary).[4]

If Congress wished to do so, it certainly knows how to provide for express federal jurisdiction and how to divest tribal courts of jurisdiction.[5] Since Congress did not divest Indian courts of jurisdiction to hear tort claims arising out of nuclear facilities (even assuming that there is complete federal regulatory preemption), the Price-Anderson Act must be construed as written and not rewritten by the courts to say what petitioners believe Congress must have meant. To hold

4. Petitioners do not even dispute these fundamental aspects of tribal jurisprudence. Indeed, at footnote 4 their petition cites two cases that actually undercut their contentions and support respondents' position here. In both of those cases — unlike the situation presented here — the finding of preemption of Indian authority was based on acts of Congress that *specifically* divested Indian tribes of authority. *See South Dakota v. Bourland*, 508 U.S. 679, 689 (1993) (discussing how the Flood Control Act and the Cheyenne River Act specifically abrogated a tribe's ability to exclude non-Indian hunting and fishing); *Northern States Power v. Prairie Island Mdewakanton Sioux Indian Community*, 991 F.2d 458, 460-461 (8th Cir. 1993) (referring to the the Hazardous Materials Transportation Act which explicitly provided the circumstances (found to exist in that case) where "any requirement of a State or political subdivision or *Indian tribe* is preempted").

5. *See, e.g.*, 15 U.S.C. § 78(aa) (securities fraud lawsuits: "The District Courts of the United States . . . shall have exclusive jurisdiction . . . of all suits in equity and actions at law brought to enforce any liability or duty created this Chapter."); *see also, e.g.*, 42 U.S.C. § 9613(b) (environmental laws); 15 U.S.C. § 717(u) (natural gas regulation); 25 U.S.C. § 1132(e) (ERISA); 42 U.S.C. § 6903(13)(A) (CERCLA provisions specifically making Act applicable to "Indian tribe[s] or authorized tribal organization[s]); 25 U.S.C. § 737(c) (providing that federal courts shall have exclusive jurisdiction concerning violations of law arising out of gaming activities conducted by the Alabama and Coushatta Indian Tribes of Texas); 25 U.S.C. § 1300g-6(c) (same; Yselta del Sur Pueblo tribe).

otherwise would do violence to well-established bases of Indian law.[6]

C. This Court's Decision In *Strate* Is Inapplicable Here

Petitioners argue that the Ninth Circuit's decision here "undermines" (Pet. 13) this Court's decision of last term in *Strate v. A-1 Contractors*, *supra*, because it requires exhaustion of tribal court jurisdiction "Notwithstanding the Absence of Both Tribal Regulatory Jurisdiction and Any Useful Purpose for Exhaustion". (Pet. 13.) Obviously, this argument requires petitioners to prove first that there exists, in fact, complete federal preemption over the present cases, a showing they cannot make, as just shown.

Furthermore, as the Ninth Circuit held, *Strate* is simply inapplicable here. PA 14a-15a n.5. (The Tenth Circuit also recognized *Strate*'s inapplicability in *Kerr-McGee*, 115 F.3d at 1506 n.4, "[a]fter carefully reviewing *Strate*".)

6. This is precisely why the courts, including this one, have repeatedly rejected the proposition that Indian courts can implicitly be stripped of jurisdiction. *See, e.g., Iowa Mut. Ins.*, 480 U.S. at 17-19 (interpreting 28 U.S.C. § 1332, the diversity jurisdiction statute); *United States v. Plainbull*, 957 F.2d 724, 726-727 (9th Cir. 1992) (where statute, 28 U.S.C. § 1355, provided for federal jurisdiction of cases "exclusive of the courts of the States", such a delegation of exclusive jurisdiction to federal courts did not apply to tribal courts because "a tribal court is not a state court" and tribal courts were therefore not divested of concurrent jurisdiction); *Becenti v. Vigil*, 902 F.2d 777, 780 (10th Cir. 1990) (where federal removal statute, 28 U.S.C. § 1441, provided for removal of cases from "state" courts but not from tribal courts, the court wrote, "The question before us, however, is not whether Congress has the power to authorize removal of actions commenced in tribal courts against federal officials, but rather whether Congress has in fact done so. . . . With this in mind, we conclude that the statutory language referring to actions commenced in 'State court' does not extend to an action in the Jicarilla Apache Tribal Court.").

In *Strate*, the Court addressed the interplay between the tribal exhaustion doctrine and the limits on tribal court jurisdiction set forth in *Montana v. United States*, 450 U.S. 544 (1981). Under *Montana*, tribal jurisdiction over a lawsuit involving non-tribe members can lie concerning incidents that arise on *non-Indian*-owned land within a reservation if either there is a "consensual relationship" between the defendant's activity at issue and the tribe's regulatory authority or the conduct at issue "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Strate*, 117 S. Ct. At 1409 (summarizing *Montana*).

Strate involved the adjudicatory reach of a tribal court where (1) a controversy existed between two non-Indian parties, (2) which arose out of an accident on a State highway as to which an Indian tribe had ceded control and thus constituted "alienated, non-Indian land", and (3) no statute or treaty authorized the tribe to govern the conduct of nonmembers on the highway in question. *Strate*, 117 S. Ct. at 1407. The Court's discussion of regulatory and adjudicatory authority upon which petitioners rely thus arose in a situation where a non-Indian was seeking to invoke tribal court jurisdiction against another non-Indian arising out of an incident that occurred *on non-tribal lands*. Since the tribe had no regulatory authority over either the land or the activity in question, it also could not have adjudicatory authority under the *Montana* analysis. Indeed, the Court stressed that the case involved a dispute that is "distinctly nontribal in nature", *id.* at 1407, and explicitly stated that its decision "express[ed] no view on the governing law or proper forum when an accident occurs on a tribal road within a reservation." *Id.* at 1406.

Petitioners' attempt to stretch *Strate* to govern the present case will not wash. Here, (1) the underlying lawsuits are brought

by members of the Navajo tribe; (2) the incidents giving rise to the underlying lawsuits — injury from abandoned mines and milling operations — took place *exclusively* on tribal lands; and (3) the tribe never divested itself of jurisdiction over either the activities at issue or the tribal lands in question. The essence of the present cases is that they involve personal injury claims brought by tribal Indians in their own tribal court alleging harms caused to them by non-Indians who entered onto the tribe's land pursuant to consensual relationships with the tribe. As the Ninth Circuit pointed out, unlike *Strate*, "the Navajo Nation retained tribal sovereignty over the land the mining companies occupied, which land was neither open to the public nor controlled or maintained by any entity other than tribe." (PA 15a at n.5).

III.

THE NINTH CIRCUIT'S ACTION IN DISSOLVING THE TRIAL COURTS' INJUNCTION WAS PROPER.

Petitioners last half-heartedly contend (Pet. 16-17) that the Court of Appeals erred by issuing a decision that vacated an unappealed portion of the district court's decision — that portion of the decision which retained jurisdiction in the district court as to Price-Anderson claims.

Contrary to petitioners' hyperbolic assertions of "confusion" and "uncertainty on a central question of appellate jurisdiction" (Pet. 17), the Court of Appeals' ruling is entirely consistent with the decisions of this Court and that of other Courts of Appeals which have repeatedly *sua sponte* raised, addressed and even decided unappealed issues on the grounds of comity. *See, e.g., Schlesinger v. Councilman*, 420 U.S. 738, 743 (1975) (raising issue of exhaustion of proceedings in the military courts because "although normally we do not consider

questions raised neither below nor in the petition, the jurisdictional and equity issues necessarily implicit in this case seemed sufficiently important to raise them *sua sponte*") (citations omitted); *Smith v. Moffett*, 947 F.2d 442, 445 (10th Cir. 1991) (raising issue of tribal exhaustion *sua sponte*); *Fortino v. Quasar Company*, 950 F.2d 389, 391 (7th Cir. 1991) (raising applicability of a statute that had not been raised in the case "for the sake of international comity, amity and commerce"); *Thomas v. Indiana*, 910 F.2d 1413, 1415 (7th Cir. 1990) (raising exhaustion of state remedies in habeas case because "delicate questions of comity can be raised on the court's own initiative. . . .") (citing *Younger v. Harris*, 401 U.S. 37, 40 (1971) and *Schlesinger*, *supra*); *Brown v. Fauver*, 819 F.2d 395, 398 (3d Cir. 1987) (raising inmate's failure to exhaust state remedies *sua sponte* because of the federal court's "interest in minimizing conflict with its state counterparts").

Additionally, the Ninth Circuit's ruling was clearly appropriate under the particular facts of these cases. Its analysis of the cases would have been identical with or without its order directing the district court to dissolve its injunction on Price-Anderson Act claims. Petitioners' appeals had challenged the application of the tribal exhaustion doctrine by the district court. Petitioners' appeals were predicated on their argument that the Price-Anderson Act had preempted the tribal claims. Respondents' arguments against petitioners' appeals challenged petitioners' assertions. In order to rule on petitioners' appeals, the Ninth Circuit necessarily had to address the question of whether the Price-Anderson Act provided an exception to the tribal exhaustion doctrine.

By ruling that the Price-Anderson Act did not provide an exception to the tribal exhaustion doctrine, the district court's action in enjoining the prosecution of Price-Anderson claims in the tribal court proceeding was a ruling that *a fortiori*

conflicted with the Ninth Circuit's conclusion. If the Ninth Circuit had not reversed the trial court's mandatory injunction, then, upon receipt of the Ninth Circuit's decision, respondents would simply have asked the district court to vacate the injunction in light of the ruling that the Ninth Circuit had made and it presumably would have had to have done so. Thus, all the Ninth Circuit actually did was save an unnecessary proceeding in the district court, and at the same time promote comity by ensuring that the Navajo courts would have an unfettered hand in addressing the issues presented to them. (The Ninth Circuit also thereby avoided a potentially repetitive appeal to itself.) These unique circumstances are hardly likely to be repeated.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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